(1)

Supreme Court, U.S.
FILED

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No:

IN THE

Supreme Court of The United States

Andrew Bestor

Petitioner

v.

United States

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the District of Columbia

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PETITION FOR WRIT OF CERTIORARI

Andrew S. Bestor appearing *pro se*
144 11th St. SE, No. 4
Washington D.C. 20003
(202) 320-3638

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55 pp

Questions

1. In dismissing a complaint, Court accepts allegations raised as factually true. In Civil Rights action versus United States alleging 42:1985 and 1986 (conspiracy) violations, is the Court obligated to accept plaintiff's composition of the United States, in this case as including the conspiracy ?

2. Does this Court intend the Third Amendment to be actionable ?

3. At least in Bestor's case involving surveillance technology, in light of pervasive invidious behavior does technology clearly extending 'the presence of a remote human operator into a home on a permanent basis' violate the Third Amendment (as Bestor argues, attempting to evade the controversy over the composition of the United States and conspiracy as raised in Question 1 above) ?

Table of Contents

Statement of the Basis of Jurisdiction in this Court**.....p.1**
Constitutional Provision**.....p.1**
A Concise Statement of the Case**.....p.3**
I. Argument (beginning)**.....p.8**
II. The term "soldier" discussed**.....p.10**
III. A short list of military personnel other than "soldiers" barred from quartering**.....p.17**
IV. Definition of "soldier" issue summarized**.....p.21**
V Broader reasons this Court should hear this case**.....p.22**
VI. Complexity of the Matter**.....p.29**

Table of Cited Authorities

Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) p.8,9, 10,27,28
Fields, William Sutton, Military Law Review v. 124 (Spring 1989), *The Third Amendment: constitutional protection from the involuntary quartering of soldiers*, p. 195-211, cites D. Douglas and G. Greenway, *English Historical Documents 1042 - 1189* (1953) p.10
Anti quartering Act, 31 Car. 2, ch. 1 (1679) p.11
Henry I's London Charter of 1130 .....p.10, 24
Henry II's London Charter of 1155.....p.11
Federalist Papers p.28
Fourth Amendment p.23
Gertz, Bill. *The Washington Times, Team to search for pilot lost since first Gulf war*, page 1, Saturday March 22, 2003 .....p.16
Griswald v Connecticut 381 U.S. 479 (1965) p.9, 26,29
Hardy, *A Free People's Intolerable Grievance - The Quartering of Troops and the Third Amendment*, 33 Va Cavalcade 126, 135 (1984) page 130..... p.11

New York assembly's 1683 Charter of Libertyes and Priviledges p.11
Katz v. United States 389 U.S. 347 .....p.24
Kyllo v. United States 533 U.S. [pending] p.23
McCullough, David. *John Adams*, Simon & Schuster, New York, Copyright 2001, p. 539-540. .....p.13
On Lee v. United States 343 U.S. 747 (1951) p.1
Silverman v. United States 365 U.S. 505 (1961) p.1,2,8
Third Amendment p.1, 9, 23
United States v. Chon, 210 F.3d 990 (9th Cir. 2000, at 993 .....p.11/12, 14, 17
United States v. Jacobsen 466 U.S. 109, 113 (1984) p.25
United States v. Karo 468 U.S. 705 (1984).....p.1, 23
United States v. Union Pacific Railroad Company 249 U.S. 354 (1918) p14,20
United States v. Wen Ho Lee CR 99-1417 JP (NM) order p.23
Wynne, Michael. Deputy Under Secretary of Defense (Acquisition and Technology), testimony to the Senate Armed Services Subcommittee on Emerging Threats and Capabilities, March 31, 2003. .....p.25-26

16 Op. Atty. Gen. 15 (May 15, 1878) p.17
19 Op. Atty. Gen. 572 (June 9, 1890) p.13, 20
27 Op. Atty. Gen. 493 (July 30, 1909), at 500 .....p.19
10 U.S.C. 191 through 194 .....p.15
10 U.S.C. 311 .....p.15
10 U.S.C. 312 Militia duty: exemptions (a)(8) p.12
THE CODE OF LAWS OF THE UNITED STATES OF AMERICA OF A GENERAL AND PERMANENT CHARACTER IN FORCE DECEMBER 7, 1925, FIRST SESSION, 69TH CONGRESS, GOVERNMENT PRINTING OFFICE, WASHINGTON 1926
10:664., 10:663., 10:915. .....p.18
42 U.S.C. 1985 and 1986 .....p.2,7,25

Statement of the Basis of Jurisdiction in this Court

(i) June 14, 2002 - Complaint dismissed by District Court, District of Columbia.

(ii) August 5, 2002 - request for reargument denied.
January 28, 2003 - dismissal affirmed by District of Columbia Court of Appeals.
March 26, 2003 - Petition for en banc and panel rehearing denied by District of Columbia Court of Appeals.

(i) and (ii) rulings included in the appendix.

(iii) Rule 12.5 does not apply in this case.

(iv) Jurisdiction is under 28 U.S.C. 1254 (1).
Third Amendment claim is implicit in record Complaint 1, explicit at 7 para.6, Brief for Appellant as VII at p.30, cited as cause of action in Petition for *en banc* and panel rehearing, and here timely raised.

Constitutional Provision
Third Amendment

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner prescribed by law.

Beginning at least forty and fifty years ago this Court addressed surveillance technologies in such well known cases as *On Lee v. United States* 343 U.S. 747 (1951) and *Silverman v. United States* 365 U.S. 505 (1961),

more recently in *United States v. Karo* 468 U.S. 705 (1984),

in the case at bar noting the additional issues of artificially and deliberately induced pain, sensation, image and audio sequences, corollary threat / threat mitigation efforts, and ultimately what is very real and immediate interaction with multiple human operators monitoring a highly technical system of neuroprosthetics in Bestor's skull and brain ongoing on an iterative basis,

which was clearly anticipated in *Silverman* at 509 though that Court neatly evaded the issue:

> [W]e need not here contemplate the Fourth Amendment implication of these and other frightening paraphernalia which the vaulted marvels of an electronic age may visit upon human society.

Bestor claims all or most previous litigation directly concerning the Third Amendment to have been extrapolated or by inference, and his to be a true Third Amendment case exactly as the framers of the Constitution anticipated save only the logical evolution of technology (an issue readily addressed by this Court in the above noted cases) and the progression of time.

In this case violations of many constitutional amendments are routine, but all derive from interactions with the human operators monitoring the neuroprosthetics. Bestor has repeatedly contacted the Federal Bureau of Investigation, others (congressional representation) contacted the FBI on Bestor's behalf, and all claimed there was no other agency for Bestor to contact. In fact the situation was "all or nothing" - FBI or no one.

A significant attraction of the Third Amendment is that it is a prohibition; while he is besieged by a raging 42:1986 conspiracy originating in truly stupefying 42:1985 and other violations, Bestor argues under the Third

Amendment he does not have to document RICO type patterns of invidious behavior,

the number of times he begged the FBI for assistance is absolutely irrelevant,

whether or not he managed to beseech the appropriate people in the FBI for assistance is unimportant,

and if he more appropriately should have contacted other government agencies is not a question.

All Bestor has to do under the Third Amendment is establish the operators are in the house and can reasonably meet the Third Amendment definition of "soldier."

A Concise Statement of the Case

In the late 1970s and early 1980s related to the verification of Soviet nuclear weapons, the United States government developed a system of neuroprosthetics or brain machine interface featuring remote stimulation of invasive implants in the human brain, monitoring the many neural impulses, and reassembling the monitored impulses into a useable data product for a human operator *on an immediate/ongoing basis* as an iterative process.

The United States apparently provided the neuroprosthetic technology to Japan to assist in the verification effort. Surreptitiously drugging and kidnapping Bestor out of his apartment while he worked in Tokyo 1992-1996, the Japanese installed the system in Bestor's skull and brain. Additional implants - some apparently uranium - were installed in Bestor's body, throat, neck, mouth, and subdermal on the head. The United States has been deeply factionalized concerning both United States use and Japanese use of neuroprosthetic system in Bestor's skull and brain.

At least in Bestor's case the human operator adjusts the stimulation (high frequency electromagnetic radiation) based on the monitored data product. Excessively stimulating the implants induces pain and sensation, at times - as noted

in the Complaint 1 Jurisdiction para 6(a3) on October 4, 2001 in the Congressional Office Buildings - incredibly severe. A single incident in 2001 showed the data product can be stored and reinduced into the human brain. More common are induced image sequences; some designed to harass, some intended to be helpful.

Radiating the neuroprosthetics *apparently* (United States certainly undertakes the action but has not been at all helpful in defining the consequences) most immediately damages the hypothalamus,

under adverse circumstances degrades vision (when the operators/surveillance/threat mechanisms decide to deliberately radiate Bestor in the eyes),

leads to excessive plaque build up in the arteries and tissue degradation resulting in crippling damage to the motor and premotor centers of the brain,

ultimately causing stroke and vascular dementia.

While some information is publicly available - in fact was published under grants from the Defense Advanced Research Projects Agency (DARPA) *which subsequent in this petition Bestor argues goes a long way towards defining 'soldier' in the Third Amendment* - the immediacy of the brain machine interface has never been publicly revealed. While surely studied the negative effects of the neuroprosthetics or high frequency radiation has never been publicly quantified, and in general Bestor claims ninety percent of a chain is worthless when every tenth link is missing.

United States use of the system in Bestor's skull and brain was undertaken as early as 1995 in Tokyo, continuing in the United States more immediately in his house (1998-1999) and apartment (current), supplemented by multilayer surveillance efforts which include both Americans and Asians and has occasionally been brazenly manifested.

In 1997-98 coworkers at The Boeing Company

Defense Group "pointedly" discussed reciprocal inspections related to Soviet nuclear weapons, but without telling Bestor he had the system of neuroprosthetics in his skull and brain. Not knowing he had neuroprosthetics in his skull and brain Bestor tried to run and hide across North America and Europe, in the course of which he contacted congressional representation, and repeatedly contacted lawyers and the FBI beginning in July 1999. In September 1999 two friends separate from each other said "implants" in a manner which, combined with other circumstances, led Bestor to conclude a series of actions had been orchestrated by United States.

IN RETROSPECT the coworkers at The Boeing Company who discussed "inspections related to nuclear weapons verification" in 1997-98 very likely were engaging in a conversation similarly orchestrated to suggest "implants," implying involvement of the United States beyond monitoring at least from a year or two earlier than the overt reference in September 1999.

Bestor claims 'that overall sequence' to be an additional liability issue in arguing against United States - neuroprosthetics are simply beyond the pale to virtually any civilian, and even most professionals particularly given both that key capabilities have been withheld from publication and the system was specifically designed to evade detection. Not only have there been soldiers quartered in the house; the United States exactly knew the presence of the soldiers would be extremely difficult to detect by design which opens up huge issues in credibility *and Bestor certainly does suggest it is a SCANDAL the United States can persevere through a 42:1986 allegation based only on the success of the conspiracy*.

In fact the United States did tell many people about 'the soldiers quartered in the house' but never Bestor, and if the United States failed to alert the appropriate people at the FBI or elsewhere that should not be a concern of Bestor's.

Suffering unbearable pain and circumstance, with no apparent refuge including in his house or apartment Bestor came to Washington D.C. in July 2001. Pervasive in record, written responses from the FBI and Department of Justice are included in the appendix and obviously show an awareness of the allegations.

Bestor circulated correspondence throughout Congress and to the Supreme Court across the mid July to mid October timeframe of 2001. Not at all familiar with Court process his correspondence was returned by the Clerk of the Court who at that time directed him to the District Court.

Undertaking research at the National Medical Library in Bethesda Maryland, Bestor discovered a preliminary study discussing the neuroprosthetic system and compelling reference to the Defense Advanced Research Projects Agency well beyond coworkers' previous pointed reference to nuclear weapons verification [record 13 at 4 and 5].

An image sequence suggesting hostile others were attempting to block Bestor out of the Federal District Court was induced in Bestor's brain on a single occasion in the December time period of 2001 (no later than December 13 2001), following which Bestor tried to file several times and was turned back on procedural grounds (believing he had a duty even in suit to conserve assets for removal of the neuroprosthetic system, he attempted to file as pauper and was denied).

Bestor asks this Court note while such pervasive invidious behavior obviously does demand litigation, as a 'practical matter' there were plentiful opportunities in 2001 and previous in which others certainly could have acted to decisively resolve the situation and did not. Most immediately the issue is imaging the neuroprosthetic system.

June 15 2002 the District Court dismissed Bestor's

Complaint without either appointing counsel or allowing Bestor to image the neuroprosthetic system in his skull and brain which will require a Court Order (pervasive in record). Based on a relationship between radiation, induced images, incidents in surveillance, and litigation, Bestor claims Judge Roberts entertained arguments concerning "composition of the United States in the 42:1986 conspiracy" in chambers without offering Bestor a chance to respond or to be at all represented. Third Amendment was implicit in record at 1 and made explicit at 7 paragraph 6.

Bestor petitioned for a reargument (denied), and subsequently appealed the dismissal of his Complaint which was ultimately similarly denied (Third Amendment at p. 30).

In the early morning hours of July 21, 2002, as Bestor lay sleeping in his own apartment an image sequence featuring Edward Kennedy, United States Senator (D-MA), and a black automobile was induced into Bestor's brain utilizing the system of neuroprosthetics. In the image sequence Senator Kennedy threatened Bestor with vascular dementia. Bestor raised the issue of the Kennedy Image Sequence in his Appeal Brief at p. 23. *Immediately* after filing the Appeal Brief on September 18, 2002 Bestor returned home via Constitution Avenue, and while walking past the Russell Senate Office Building an individual associated with Senator Kennedy maneuvered around the black car used in the induced image sequence then double parked on Constitution Avenue outside Russell [or a very similar car] in a manner designed to be seen by Bestor, which Bestor - claiming Kennedy participates in the conspiracy - equates to the United States making the matter a travesty of justice.

Bestor contends in dismissing his complaint the District Court was obligated to accept his definition of the 'United States' (specifically as including the conspiracy), and that the actions of the defendant substantially vacated both

the *Federal Tort Claims Act* and the concept of *Qualified Immunity* in the course of undertaking the 42:1985 and 1986 violations, but desperate to address the issue of the neuroprosthetics in his skull and brain, the exposure to radiation, and the actions of the various factions in the United States which happen on an ongoing basis both arbitrarily and related to the Japanese, and which often times do take place in his apartment, Bestor seeks to evade the political controversy by claiming his rights have been violated under the Third Amendment, as in his Appeal Brief and Petition for *en banc* and panel rehearing.

Previously noting the progression of technologies suggested but not explored in Silverman, at some level this Court must be anticipating Third Amendment litigation. In his arguments Bestor also makes reference to emergent United States surveillance techniques utilizing the internet, suggesting while both may be 'equally accessible' computers located in private houses enjoy protections not afforded computers located elsewhere,

home monitoring utilizing relatively simplistic technologies such as electronic cuffs and hard line telephones,

only in light of *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) *which extended the Third Amendment right to government housing* the fate of PFC Barry Winchell, an Army soldier beaten to death in barracks for dating a transgender female,

and other instances of quartering, ultimately suggesting the Third Amendment protection is under utilized and here timely litigated.

Arguing *pro se* the case has been poorly pled.

I. Argument (beginning)

As in *Silverman*, 365 U.S. at 512, this Court's decision must be "based upon the reality of an actual intrusion into a

constitutionally protected area." In establishing precedence related specifically to the Third Amendment Bestor is hopeful this Court will expand the Third Amendment expectation in *Griswald v Connecticut* 381 U.S. 479 (1965) at 484 making Bestor's skull and brain a "zone of privacy" which in this case would clearly make the Third Amendment right portable. Without such an expansion this Court may decide the pivotal instances are only the ones which literally take place in Bestor's house or apartments [actually multiple apartments given the radiation and repeated consequential relocations since 1996], still more than sufficient to find in Bestor's favor.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner prescribed by law.

In short - at least in this case - of the five phrases:

1. The 'consent of the owner' is the clearest (they don't have it and never had it).
2. In terms of pristine clarity, 'consent' is closely followed by selection of either of the two given conditions - here 'in time of peace' as 'time of war' does not apply in this case. The larger issue from the perspective of this Court is that the qualification makes the Third Amendment right comparable to other Constitutional rights (freedom of speech, freedom of assembly) which may similarly be only conditionally restrained.

3. 'Quartered in any house' is certainly clearer here than in Engblom v. Carey 677 F.2d 957 (2d Cir. 1982) which was actually government owned housing as opposed to private holding and did not allege forced cohabitation; the human operator(s) here displaying incredible immediacy and

fluency arguably more than ever undertaken elsewhere previous in that they monitor and react to true thought rather than simply speech or action.

This Court will certainly agree both that the presence of other soldiers in the house does not legitimize the quartering of United States soldiers, and that at least in this case the United States can not evade responsibility for the quartering having given the other soldiers the hugely specialized keys to the house.
[As an academic point, time of peace is also clearer here than in *Engblom*].

4. Leaving this Court to find that participants in this case meet the requirements for a 'soldier' either by virtue of technology, practice, employment, affiliation, association, including with a government security agency or any government entity at all, or 'collaboration in a conspiracy in which elected representatives and government officials participate' - abundantly clear in this case though perhaps less so in others.

II. The term "soldier" discussed

1. (A). The Third Amendment's origin is in ancient British common law which clearly prohibited the quartering of anybody by the government; a compelling reason the term "soldier" should not have to be defined in the context of the Third Amendment prohibition beyond showing some relationship to government.

William Sutton Fields, Military Law Review v. 124 (Spring 1989), *The Third Amendment: constitutional protection from the involuntary quartering of soldiers*, p. 195-211, cites D. Douglas and G. Greenway, *English Historical Documents 1042 - 1189* (1953) page 945:

Henry I's London Charter of 1130
"[l]et no one be billeted within the walls of the city, either of my household, or by force of anyone else"
Id 946:
Henry II's London Charter of 1155
"that withen these walls no one shall be forceibly billeted, or by the assignment of the marshal"

Military Law Review page 198:
"In 1679 Parliament passed the Anti quartering Act, which provided that '[n]oe officer military or civill nor any other person whatsoever shall from henceforth presume to place quarter or billet any souldier or soldiers.' 31 Car. 2, ch. 1 (1679)

In theory the protection afforded by the Act was substantial, in that the Act applied in both war and peace and contained no exceptions."

(B) Additionally, New York assembly's 1683 Charter of Libertyes and Priviledges expanded the prohibition to include "Mariners," a generous term going well beyond "sailor" amply illustrating the totality of the prohibition.

Hardy, *A Free People's Intolerable Grievance - The Quartering of Troops and the Third Amendment*, 33 Va Cavalcade 126, 135 (1984) page 130:

"...New York assembly's 1683 Charter of Libertyes and Priviledges and read,'Noe freeman shall be compelled to receive any Mariners or Souldiers into his house and there suffer them to Sojourne, against their willes provided Alwayes it be not in time of Actuall Warr within this province.'

That generosity survives in law regarding conduct of the military related to civilians, from *U.S. v. Chon*, 210 F.3d 990 (9th Cir. 2000) at 993:

> "Although the Posse Comitatus Act does not directly reference the Navy or Marine Corps, we do not construe this omission as congressional approval for Navy involvement in enforcing civilian laws. See *United States v. Khan*, 35 F.3d 426, 431 (9th Cir.1994).

and in the treatment of "Mariner" relative to "soldier" as a similarly distinguished term.

> 10:312 Militia duty: exemptions
>
> (a) The following persons are exempt from militia duty.
>
> (8) Mariners in the sea service of a citizen of, or a merchant in, the United States.

The point to including the latter citation here is that as "soldier" remained in the prohibition so did "Mariner" in concept, only that mariners might typically be more strategically employed in civil service rather than military conscription even in the event of war.

2(A). In historical context Bestor asks this Court note as the Constitution was enacted it was not certain the United States was to have a standing army at all:

> [Following resolution of matters with France] "The fate of the now useless and unpopular army was settled with remarkably little fuss, showing how greatly times had changed. Adams declared that were it left to him the army "should not exist a fortnight." Both Federalists and Republicans in Congress, seeing no reason why Adams should get the credit, voted to

disband the army by summer." [circa 1800 given both the death of Washington and the political maneuverings of Alexander Hamilton]

David McCullough, *John Adams*, Simon & Schuster, New York, Copyright 2001, p. 539-540.

(B). United States has historically extended the term "troops" beyond immediate military business, litigated by land grant railroads trying to define their responsibility for transportation:

"The claim is made on the part of the railroad company that "transportation of troops" as used in the two sections quoted, means the transportation of troops of the United States for military purposes, and not on business connected with river and harbor improvements, which is civil business.

I can not agree with this contention. Both sections provide for the transportation of troops of the property of the United States....

Troops of the United States are the military forces of the United States, which necessarily include the Army of the United States. An officer of the Engineer Corps is a member of the that army, and is therefore within the more general expression of the statute *(several dictionaries literally defining "soldier" as "private" or "enlisted member," perhaps explaining the latter half of the sentence - Bestor italics)....*

Probably in time of war no one would pretend that members of the Engineer Corps of the Army would not be included under the name of "troops." Surely they are none the less "troops" in time of peace, nor are they less 'troops' when professionally engaged in improving the navigation of a harbor than when constructing fortifications with a view to protection of that harbor."

19 Op. Atty. Gen. 572 (June 9, 1890)

That opinion was cited in *United States v. Union Pacific Railroad Company* 249 U.S. 354 (1918) when that Court explicitly recognized the controversy at hand without resolving it (clearly the issue has arisen before):

> We have no occasion to consider whether persons not enlisted as soldiers, but forming a part of a moving army or detachment are to be deemed "troops of the United States" within the provision of the land-grant acts; nor whether a soldier travelling for the purposes of the Government, but not any purpose connected with war or the preparation of war, falls within the provisions, 19 Op. Atty. Gen. 572.

3(A.) Recent law and legislation certainly favors Bestor in co-mingling members of the armed services and civilian employees.

From *U.S. v. Chon*, 210 F.3d 990 (9th Cir. 2000) at 993.

> [concerning search and seizure] "In doing so, civilian NCIS [Naval Criminal Investigative Service] agents represented and furthered the interests of the Navy, and were delegated the same authority to do so as military NCIS agents. When the civilian world is confronted by agents of the Navy, it is unlikely to make the fine distinctions asserted by the government between military and civilian NCIS agents.
>
> The government also contends that the NCIS should be exempt from PCA-like [Posse Comitatus Act] restrictions because it is headed by a civilian director with a civilian chain of command. As the record indicates, however, the NCIS Director has a direct reporting relationship to the Chief of Naval Operations,

a military officer. Despite a civilian Director, the NCIS continues to be a unit of, and accountable to, the Navy. [We thereby hold that the NCIS is bound by the limitations of Section 375]."

Title 10, Chapter 8, Sections 191 through 194 totally vacates any narrow definition of "soldier" and additionally illustrates the legislature's intent to co-mingle including oversight and supervision with the Central Intelligence Agency and National Security Agency, beginning:

10:191. Secretary of Defense: authority to provide for common performance of supply or service activities
(a) Authority.-Whenever the Secretary of Defense determines such action would be more effective, economical, or efficient, the Secretary may provide for the performance of a supply or service activity that is common to more than one military department by a single agency of the Department of Defense.

And continuing at least through10:194. Limitations on personnel

(a) Cap on headquarters management personnel.- The total number of members of the armed forces and civilian employees assigned or detailed to permanent duty in the management headquarters activities or management headquarters support activities in the Defense Agencies and Department of Defense Field Activities may not exceed the number that that is the number of such members and employees assigned or detailed to such duty on September 30, 1989.

Similarly, 10:194 (b) addresses all personnel other than headquarters personnel. The culmination of expansive legislative intent is the definition of "Militia" under Title 10.

Title 10 Chapter 13 Sec. 311. Militia: composition and classes

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

Title 10 then administratively divides the militia into various classes, the quartering of which are equally prohibited under the Third Amendment. In practice, the reality of who is or is not to be considered a 'soldier' for purposes of the Third Amendment prohibition is not highly defined. As best Bestor could determine, "Officer" is defined and "Enlisted Member" is defined in United States Code, but "soldier" is not defined.

(B). Legislative intent to co-mingle has been enacted in fact. Citing here from *The Washington Times*, Bill Gertz, *Team to search for pilot lost since first Gulf war*, page 1, Saturday March 22, 2003, but pervasive elsewhere in the media,

> "Defense and intelligence agencies have formed a special unit that will go into Iraq to search for Capt. Michael Scott Speicher, a missing U.S. Navy pilot believed to have been held captive in Iraq since 1991.....The joint program by officials of the Defense Intelligence Agency, the CIA, U.S. Central Command and other agencies also will conduct a nationwide search of Iraq for terrorists and chemical, biological and nuclear weapons, said Lt. Cmdr. James Brooks, a DIA spokesman.

The National Reconnaissance Office (NRO) has no staff of it's own but is almost entirely composed of seconded Air Force and CIA personnel in an integrated hierarchy as are other Defense Agencies and Department of Defense Field

Activities *ipso facto* in the above citation - *Lt. Cmdr.* (not an Army officer) *James Brooks, a DIA spokesman.* Would this Court apply the quartering prohibition to Army but not Navy personnel of the Defense Intelligence Agency [?]. Of course not. To the military but not civilian personnel [?]. That would effectively be overturning *U.S. v. Chon*, 210 F.3d 990 (9th Cir. 2000). Put another way the text of the amendment fails to limit or define the affiliation of the "soldier" - private parties cannot quarter mercenaries or security guards.

III. A short list of military personnel other than "soldiers" barred from quartering

Bestor certainly intends the thrust of his arguments to address modern practices including co-mingling of personnel complete with doctrines of *respondent superiors* well established in law, but in fact "soldier" as opposed to other employees of the military who are not soldiers but would similarly be prohibited from quartering by the Third Amendment is by no means clear:

> Furthermore, by the sixty-third Article of War, "all retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are subject to orders according to the rules and discipline of war." This provision, like that contained in section 1343, comes into play only at a particular time, namely, when the army is in the field; and by virtue thereof persons of that description, though not otherwise subject to military law, become for the time amenable to court marshal jurisdiction for any breach of good order, whether as affecting the discipline of the Army or the rights of individuals. (Benet, p. 29.)
> 16 Op. Atty. Gen. 15 (May 15, 1878)

One month later came what must have at the time been an

infamous prohibition on laundresses:
THE CODE OF LAWS OF THE UNITED STATES OF AMERICA OF A GENERAL AND PERMANENT CHARACTER IN FORCE DECEMBER 7, 1925, FIRST SESSION, 69TH CONGRESS, GOVERNMENT PRINTING OFFICE, WASHINGTON 1926

> 10:664. Laundresses.- Women shall not be allowed to accompany troops as laundresses. (June 18, 1878, c.263, section 5;20 Stat. 150.)

obviously implying woman had accompanied troops at least conceptually as laundresses. Immediately previous in THE CODE OF LAWS 1926 noting the Secretary of War was allowed to appoint people to certain positions entirely apart from civil-service regulations:

> 10:663. Appointment of civilians employed in hostess and library service.- Civilians appointed in the hostess and library services and paid from appropriation for military post exchanges may be appointed by the Secretary of War without reference to civil-service rules and regulations. (Mar. 2, 1923, c.178, Title I, 42 Stat. 1380).

Also from LAWS 1926:

> Title 10:442 Civilian military training camps.- The Secretary of War is authorized to maintain, upon military reservations or elsewhere, schools or camps for the military instruction and training, with a view to their appointment as reserve officers or noncommissioned officers, of such warrant officers, enlisted men, and civilians as may be selected upon their own application; [further discussing use and material].[Underlining by Bestor for emphasis].

Fascinating in LAWS 1926:

> 10:611. Indian Scouts.- The President is authorized to enlist a force of Indians, not exceeding one thousand, who shall act as scouts in the territories and Indian country. They shall be discharged when the necessity for their service shall cease, or at the discretion of the department commander: *Provided*, That a proportionate number of noncommissioned officers may be appointed. (R.S. Section 1112; Aug. 12 1878, c.263, 19 Stat. 131)
> 10:915. Allowance to Indian scouts for horses.- Indian scouts, when they furnish their own horses and horse-equipments, shall be entitled to receive 40 cents per day for their use and risk so long as thus employed. (Aug. 12 1876, c.263, 19 Stat. 131.)

The Indians were to be enlisted as "scouts" which may or may not be considered by the Court as different from "soldiers" given pervasive disparities in situation and contract but in any case showing co-mingled civilian equipment or at least privately owned contractor equipment with military function, assuming responsibility for providing supervision, and offering not replacement but insurance against risk. The Third Amendment surely bars the whole package from quartering.

Fascinating in practice: Army pay clerks and Navy pay clerks - similarly civilian appointments - were for years treated differently from each other and from other officers ultimately clarified by 27 Op. Atty. Gen. 493 (July 30, 1909), at 500:

> Even if this case lacked many of the essential elements of a complete grant by Congress of the power to make these appointments, still, generally, wherever such a power may be expressly conferred, it may also be conferred by long and uniform acquiescence in and assent to its exercise. And in this case, after so long

> and uniform an exercise of this power by the various Secretaries of War, with the full knowledge and consent of Congress, it is now much too late to say that during all this time this power has been usurped by the War Department with the full knowledge and assent of Congress, and that the money paid this small army of clerks was illegally expended.

at 501(after a series of citations from historic references which were difficult for Bestor to follow, but seemingly earlier in history):

> "If these officers are not in the naval service, it may well be asked who are."

and at 506:

> If the case were one of original impression I should hesitate to hold that the appointment of a paymaster's clerk under the provisions of the statute above quoted constituted the clerk a part of the military establishment and made him an officer within the meaning of the act related to retirement; but, in view of the practical construction which has been given to the statute by the War Department and the Controller's office, the recognition by congress, and the decisions of the Supreme Court, above referred to, I am constrained to the conclusion that these clerks are properly appointed by the Secretary of War, and are officers of the United States within the constitutional meaning of the term; and that they are officers in the regular service within the meaning of the acts of Congress with respect to retirement.

The Court in *United States v. Union Pacific Railroad Company* raised the obvious question and very nearly answered it; 19 Op. Atty. Gen. 572 (June 9, 1890) had it

right - the founding fathers almost certainly meant the term "soldier" (and more importantly the quartering prohibition) to include sergeants and officers - though that is not necessarily clear in a dictionary definition - as well as the blacksmith, quartermaster, teamster, and farrier, here an electronics or surveillance technician. To examine the other side of the same question, originally English and then transplanted to the New York colony presumably targeting the Crown [in 1683 the Constitution yet one hundred years distant] the Third Amendment prohibition does not specify the nationality of the "soldier" and presumably equally precludes quartering of the Hessians and French. In this case at bar "soldiers" are both American and Japanese, who at the time of the Constitution's writing were (to an even greater extent than the British) a society based on feudalism and vassalage, "soldier" equally including Samurai and servant. Ironically, suffering the same problem in the same time period, the Japanese were not protected by a similar Third Amendment right which was cunningly and pervasively exploited by the Tokugawa Shogunate.

This Court must agree today the prohibition applies to the quartering of NATO 'soldiers' in the United States, sailors from foreign Navies visiting American ports of call, and the thousand plus member German *Luftwaffe* (Air Force) unit apparently in permanent residence at Holloman Air Force Base in Southern New Mexico.

This Court must also agree the presence of other soldiers in the house does not legitimize the quartering of American soldiers in the house.

IV. Definition of "soldier" issue summarized

As best Bestor could determined there is absolutely no evidence suggesting the writers of the amendment sought or

anticipated a narrow definition of "soldier" which, concerning the wording and construct of virtually any other constitutional amendment, would be in and of itself a compelling reason to hear this case.

Convincing this Court to pick a 'pristine' Third Amendment case following Marshal's approach to this Court arguing racial integration and Ginsburg sexual discrimination, Bestor believes it fortuitous to his cause "soldier" here is as obvious as it is - the technology was developed by the United States for nuclear weapons verification,

the Defense Advanced Research Projects Agency or DARPA awarding grants and contracts in research and application [13 at 4 and 5, Appeal Brief at 34 specific to neuroprosthetics],

other security agencies pervasively [certainly on the increase rather than the decrease] co-mingle "members of the armed forces and civilian employees assigned or detailed to permanent duty" which in this case includes emitting radiation and monitoring the neuroprosthetics,

combined with FBI denial and evasion [appendix and pervasive in record],

and the origin of Bestor's situational awareness based in a conversation between employees of The Boeing Company Defense Group - a frequent government contractor - in the course of their employment in either 1997 or early 1998 showing United States use of people outside government which has also been pervasive.

V Broader reasons this Court should hear this case

In the Third Amendment the founding fathers intended to protect citizens from government intrusion into their dwellings well beyond conceptual speech or assembly / association issues, and that is enough for Bestor. A broader problem which confronts this Court may be in comparing

and contrasting the Third and Fourth Amendments; while the Third literally says "in the house" in 1998-9 Bestor was repeatedly assaulted with electromagnetic radiation while painting the exterior of the house and he certainly wants curtilage. That expectation is fueled by this Court's recent contextual decision in *Kyllo v. United States* 533 U.S. [pending] where this Court reasoned "from the original meaning of the Fourth Amendment forward...in light of what was deemed an unreasonable search and seizure when it [the amendment] was adapted."

In *Kyllo* this Court looked at police technology eroding the privacy guaranteed by the Fourth Amendment, specifically the Agema Thermovision 210 thermal imager "not in general public use" though certainly more readily available than the neuroprosthetics and implants here. It is actually not clear to Bestor how the 'beeper in the can' in *Karo v. United States* 468 U.S. 712 evaded quartering once it was placed in the house and monitored in the house, and he can only suggest the test must be some level of human interaction.

Not familiar with the practice, more typically in undertaking *home monitoring* government presumably does not deny the quartering, only that with the relative consent of the owner the act evades the Third Amendment prohibition. Generally employing common technologies such as electronic cuffs and hard line telephones, it is none the less an outcome negotiated with one party in a position of vulnerability relative to the State. Hastening to differentiate himself from that class (this not being a criminal matter), Bestor suggests the practice is underlitigated and includes persuasive circumstances taken from an order in *United States v. Wen Ho Lee* CR 99-1417 JP (NM) in his appendix.

On the other hand, while what can be readily seen from the exterior of the house is not protected by the Fourth but certainly should be by the Third; unlike Kyllo who

distained shielding Bestor going to great lengths in attempting to protect himself from the electromagnetic radiation [using glass block, lead sheeting, etcetera].

Where to end ? This Court will also note pervasive civil instances in which lower courts mandate cohabitation in the course of estrangement or divorce. Bestor does not know if the broad definition of 'militia' should spare all women in the United States from having to cohabitate with any man between the ages of seventeen and forty five but certainly a military spouse, and surely society has not regressed from Henry I's London Charter of 1130: "[l]et no one be billeted within the walls of the city, either of my household, or by force of anyone else." The *Silverman* definition of the Fourth Amendment circa 1961 was subsequently expanded by *Katz* 389 U.S. 347 at 353:

> *[O]nce it is recognized that the Fourth Amendment protects people - and not simply "areas"* - against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. [Bestor italics].

Though not an issue here the Third Amendment should similarly be recognized commensurate to what are really the "recently emergent" property rights of women. After a long and miserable marriage a college friend's mother was beaten to death by his father at what was to have been the end of a forced cohabitation period following their divorce - Mary Ann Southwick, Fairfield Connecticut, beaten to death by Edward R. Southwick with an axe in the mid 1990s. It does happen.

In apprehending Ted Kaczynsky [Unibomber], monitored by

a live human operator the United States radiated Mr. Kaczynsky in his cabin - clearly the government employs police technologies beyond neuroprosthetics capable of projecting a human presence into the house. Presumably the United States would argue either the limited duration of the undertaking or the pending criminal charges against Mr. Kaczynsky evaded the Third Amendment prohibition.

Absent all criminal accusation Asian members of Falun Gong allege routine and pervasive surveillance in their homes in the United States by the Chinese government, and the remote operator/technology issue is certainly a timely one; again Bestor notes while he suffers pervasive injuries others may find an enforced Third Amendment prohibition attractive as a shield in that it seems to emphasize 'the act' in and of itself as opposed to the Fourth Amendment. It ain't a "search" or "seizure" as defined in *United States v. Jacobsen* 466 U.S. 109, 113 (1984) (*which defeated Karo on the point at 468 U.S. 712*), but here it don't have to be.

More pervasively yet, at one time Microsoft installed embedded files 'surreptitiously periodically communicating utilization data to Microsoft via the internet' on the hard drives of personnel computers sold in the United States for home use. Previously noting the concept of 'soldier' is ill defined, as the Third Amendment prohibition is written that practice would seemingly be actionable as quartering. Perhaps more ominous from a civil liberties perspective, the Defense Advanced Research Projects Agency or DARPA - exactly the same agency handling the neuroprosthetics which are a focus in this case - is developing a massive computer search capability called the Total Information Awareness (TIA) System. The "Genoa System" is an existing capability;

> "Genisys is a FY-03 new-start program. The Genisys program's goal is to produce technology enabling ultra-large, all source information technologies." [Total Information Awareness (TIA) System website, 31

March 2003].

Before the Senate Armed Services Subcommittee on Emerging Threats and Capabilities, Michael Wynne, Deputy Under Secretary of Defense (Acquisition and Technology) emphasized DARPA's integrated relationship with the uniformed services in writing (pages 5 and 12 included here in appendix) and verbally characterized the Total Information Awareness System as "a giant search engine."

Many small organizations and independent consultants run websites from computers located in private homes; surely DARPA's monitoring of those sites off the computer hard drive is in some way limited. Leaving the door unlocked for tradesmen and guests should not be taken to permit the government to quarter soldiers in the house - not a Fourth Amendment protection but a Third.

In open testimony March 31, 2003 Mr. Wynne discussed losing control of United States military technology both in direct transfers as in this case and via foreign researchers studying in the United States often related to government contracts and grants; from Mr. Wynne's testimony Bestor surmised the United States may incur related liability in the use of technology by others more frequently than is commonly understood.

Counterintuitive but as persuasively, an enforced Third Amendment right should serve to protect homosexuals or other minority groups in the military at least as permanent party in that *Engblom* generously extended the right to government housing and *Griswald* significantly noted an accompanying privacy expectation while not necessarily challenging 'don't ask don't tell.' While Bestor is only a former National Guardsman, he suspects sexuality in the regular military is a minor issue in formation but a major issue in the barracks, here referencing the beating death of

Private First Class Barry Winchell, Fort Campbell Kentucky, early morning hours of July 5 1999 following a lengthy sequence of harassment by fellow soldiers in quarters. Wonderful for Bestor's claim, Winchell was not homosexual - which would be prohibited - but merely dated transgender.

Winchell's circumstances were similar to Bestor's in roughly the same time period in that he was apparently forced from his sleeping location in a room and made to sleep on a cot in the hall [where he was beaten to death]. The military will almost certainly agree Winchell had a right not to be beaten to death by soldiers in the barracks; Bestor argues under *Engblom* the military was clearly obligated to defend Winchell in the room number one, and number two claims Winchell took his Third Amendment right with him to the corridor when he was forced from the room [conveniently for the number two argument Winchell was still in the building; under *Engblom* the protected housing presumably includes both the bed and the route to the bathroom. In Bestor's case he was forced from his house which he owned and slept in his truck which he also owned]. Neither Winchell or Bestor would use the Third Amendment as a sword to break new ground but rather as a shield, Bestor exactly in the manner in which it was intended and the unfortunate Winchell certainly well within *Engblom*.

Opposition may claim the Third Amendment was never intended to protect soldiers against quartering. Bestor has two replies. First, it is widely noted Justice Scalia tends to diminish the importance of documentation beyond the legislation actually enacted, and what was enacted is a very broad prohibition.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner prescribed by law.

Even if considered the *Federalist Papers* come nowhere near this point as best Bestor can surmise.

Second, as a former Army National Guardsman from the State of Pennsylvania, at least in the mid 1980s the command structure of a small town detachment felt the Fourth Amendment shielded a soldier's locker from being searched after Bestor accused the soldier of stealing a bayonet from Bestor's arms room, the point being the founding fathers much more likely intended the Third Amendment protect a threatened government employee than the Fourth Amendment a corrupt government employee (like everyone else, a policeman is undeniably shielded by Miranda and the Fifth Amendment, the thrust of that argument well beyond Bestor being emboldened by *Engblom*). Given the Founding Father's profound mistrust of central government Bestor has no idea how or why the Fourth and Fifth Amendments came to protect government employees but in fact they do, similarly the Third should.

More generally Bestor alleges more quartering goes on than may be immediately apparent though it does tend to be among poor people and silent constituencies, and does not here attempt to fully explore any of these related points but only claim they reasonably could be argued, the larger point before this Court is that clearly the right is timely raised and demands clarification.

Third Amendment, the bus doesn't stop here very often, though Bestor argues the bus should stop here more frequently than it does, taking this opportunity to chastise the District of Columbia Court of Appeals for the suspicious omission of Third Amendment precedence. 'Only by luck' did Bestor stumble into that Court [*pro se* he had no idea in the entire United States that particular Appeals Court actually was the appropriate venue] but he did, and they erred in refusing to hear the case.

As a young man Justice Breyer apparently wrote an early draft or assisted in drafting the famous decision in *Griswald* which provided an unsolicited - and oft cited - reference to the expectations of the Third Amendment; the intervening years have certainly not narrowed the right but at least concerning the technology have heightened the risk (how much *home monitoring* was there in 1965 [?]), and Bestor cannot believe relief will be denied him now.

Instead of stopping the quartering the United States has attempted to adjudicate it AND PARTICIPATES IN IT. The particular incident cited in the Appeal Brief is indicative of the larger pattern; an image sequence featuring Senator Kennedy [with whom Bestor has absolutely no relationship apart from his office] was artificially induced in Bestor's brain as Bestor lay sleeping in his apartment, in an act very much beyond Kennedy's capabilities or the capabilities of his office to undertake unassisted.

VI. Complexity of the Matter

Crossing the Federal Tort Claims Act, Bivens, Qualified Immunity, large parts of the Constitution, most of the Amendments, and much Civil Rights law all the while subjected to the physically painful invidious behavior of a hostile assailant certainly in full view of the United States [whether or not the United States accrues liability being separately the question at hand], this is not an easy case to argue.

Only coming to understand Civil Rights law in the course of the litigation, Bestor - a white male who arrived at the Third Amendment by way of a 42:1986 (conspiracy) claim - does not hesitate to suggest *home monitoring* may be unfairly focused on minorities *reflected in the dearth of litigation* to the detriment of all which puts a "Catch-22" squarely before this Court. United States may well be acting as a 'benevolent despot' in undertaking pervasive violations

of Civil Rights in part knowing the victims cannot complain without suffering further deprivation.

'Brief for the United States' in *Kyllo* under 'Statement' heading [several paragraphs down following the number '1'] notes the Agema Thermovision 210 thermal imager equipment was used by "Oregon National Guard Sergeant Dan Haas." While courts are loath to expand *Posse Comitatus* there is virtually nothing in legislation or law to restrain the definition of quartering or even suggest it was meant to be restrained (other than in times of war). Citing from Henry I's London Charter of 1130 this Court may consider Bestor an uninhibited litigant, but that really reflects the ancient origins of the prohibition. Realistically this juggernaut of technology and effort - which certainly does involve the military - cannot endlessly be so totally focused on one individual without either *Posse Comitatus* or *Habeas corpus* coming into play.

Reflecting a larger process issue, 'if ten percent of the litigants in the federal courts have to argue *pro se* this Court should hear *pro se* litigants ten percent of the time' and Bestor suggests *pro se* litigants do suffer a pervasive bias in front of the federal bench. He is hopeful one justice of this Court will be willing to add *physical assault or proximate danger* to the list of circumstances a District Court must consider in deciding on appointment of counsel; while he is not a *pauper* Bestor claims all litigants suffering assault including *pauper* litigants should have benefit of counsel.

Still, end of the day the case is not so complex as to defy all description. While a fascinating academic question - ***at least in modern judicial history has the right been pervasively under-litigated or has the prohibition only been recently violated with the emergence of the enabling technology*** - Bestor claims in his case the Third Amendment prohibition has been violated and he turns to this Court for redress.

Respectfully submitted,

Andrew S. Bestor appearing *pro se*
144 11th St. SE, No. 4
Washington D.C. 20003
(202) 320-3638

Appendix Table of Contents

Opinions and Orders**.....*p.3***
Complaint Dismissed
United States District Court for the District of Columbia, ANDREW BESTOR, Plaintiff, v. UNITED STATES, Defendant. Civil Action No. 02-0279 (RWR).....p.3
Reargument Denied.....*p.5*
Dismissal Affirmed (Third Amendment explicit in Brief for Appellant VII from page 30).....p.9
Petition for en banc and panel rehearing denied (Third Amendment).....p.10

Appendix under Rule 14 (i)(ii) Relevant Opinion in Companion Case**.....*p.12***
Complaint Dismissed
United States District Court for the District of Columbia ANDREW BESTOR, Plaintiff, v. MILTON ASHLEY, M.D., et al., Defendants. Civil Action No. 02-1583 (RWR) MEMORANDUM OPINION (excerpt at page 5) p.12

Appendix under Rule 14 (i)(vi) Material Petitioner Believes Essential to Understanding Petition**.....*p13***
United States v. Wen Ho Lee (cited in Petition for Writ of Certiorari at p.23 as "home monitoring") IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, UNITED STATES OF AMERICA, Plaintiff, vs. WEN HO LEE, Defendant, No. CR 99-1417 JP ORDER SETTING CONDITIONS OF RELEASE - DRAFT (available off internet referencing "Renewed Motion" for Pretrial Release (Doc. No. 114)).....p.13

Pervasive Contact with FBI/Department of Justice (not including multiple telephone calls)

U.S. Department of Justice, Federal Bureau of Investigation Washington, D.C., NOV 16 1999, Request No. 910524 to Mr. Andrew Bestor from John M. Kelso, Jr., Chief, Freedom of Information - Privacy Act Section Office of Public and Congressional Affairs.....p. 14

U.S. Department of Justice, Federal Bureau of Investigation Washington, D.C. 20535, October 26, 2001 to Honorable George Allen, United States Senator, from Arthur Radford Baker, Unit Chief, Office of Public and Congressional Affairs.....p. 16

U.S. Department of Justice, Civil Rights Division, Washington, D.C. 20530, October 25, 2002, TW: bl DJ 144-16-0, to Andrew Bestor from Theresa Weathers, Civil Rights Division.....p. 17

Defense Advanced Projects Research Agency as pertaining to "soldier" in the Third Amendment, cited in Petition for Writ of Certiorari at page 26: Testimony of Michael Wynne p.17

Appendix under Rule 14 (i)

Opinions and Orders

Complaint Dismissed

United States District Court for the District of Columbia
ANDREW BESTOR, Plaintiff,
v.
UNITED STATES, Defendant.
Civil Action No. 02-0279 (RWR)
MEMORANDUM OPINION

Plaintiff, proceeding pro se, has filed suit against the United States seeking damages for "[d]efendant's failure to protect [p]laintiff from electromagnetic radiation, assault, and surveillance undertaken by [the] nation of Japan...." (Compl. *para* 6.) He appears to base his claim on 42 U.S.C. *SS* 1985 and 1986 (West 2000) and 18 U.S.C. *SS* 1584 (West 2000). Defendant has moved to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Because plaintiff has not identified any claim over which this Court has subject matter jurisdiction, defendant's motion to dismiss will be granted.

A dismissal pursuant to Fed. R. Civ. P. 12(b)(1) is proper where a plaintiff fails to establish by a preponderance of the evidence that subject matter jurisdiction exists. See Tavoulareas v. Comnas, 702 F.2d 192, 195 (D.C. Cir. 1983); Fitts

(ruling page 2)
v. Fed. Nat'l Mortgage Ass'n, 44 F. Supp. 2d 317, 320 (D.D.C. 1999). Because "[t]he United States, as sovereign, is immune from suit save as it consents to be sued,... the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood,

312 U.S. 584, 586 (1941). Accordingly, a plaintiff suing the United States must identify a cause of action to which the United States consents to be sued; otherwise, a court lacks subject matter jurisdiction over the claims.

Plaintiff has failed to allege any cause of action that is not barred by sovereign immunity. Plaintiff seeks recovery for United States' alleged violations of 42 U.S.C. *SS* 1985 and 1986. Plaintiff seeks recovery for the United States' alleged violations of 42 U.S.C. *SS*1985 and 1986. However, "[t]hese statutes, by their terms, do not apply to actions against the United States." Hori v. United States, 782 F.2d 227, 245 n.43 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64 (1987); see also Graves v. United States, 961 F. Supp. 314, 318 (D.D.C. 1997) (dismissing *SS* 1985 claim against the United States for lack of subject matter jurisdiction because such a claim was barred by the doctrine of sovereign immunity). Because *SS* 1985 and 1986 do not apply to actions against the United States, sovereign immunity has not been waived and this Court lacks subject matter jurisdiction over these

(ruling page 3)
claims.1 Likewise, 18 U.S.C. *SS* 1584, a criminal statute which does not provide for any type of civil remedy, Buchanan v. City of Bolivar, 99 F.3d 1352, 1357 (6th Cir. 1996), does not waive the United States sovereign immunity. Consequently, *SS* 1584 provides plaintiff with no claim maintainable against the United States.

Because this Court does not have subject matter jurisdiction to hear plaintiff's claims under 42 U.S.C. *SS* 1985 or 1986 or under 18 U.S.C. *SS* 1584, defendant's motion to dismiss for lack of subject matter jurisdiction will be granted. A final order consistent with this memorandum opinion will be issued.
SIGNED this 4th day of June, 2002. RICHARD W.

ROBERTS, United States District Judge.

1Despite the fact that plaintiff's complaint does not allege a violation of 42 U.S.C. *SS* 1983, plaintiff argues that dismissal of his claim is inappropriate because he has a viable *SS* 1983 claim against the United States. Even if plaintiff's complaint could be read as advancing a claim under *SS* 1983, such a claim would be barred by sovereign immunity. Section 1983 does not apply to actions against the United States. See Hohri, 782 F.2d at 245 n.43.

United States District Court for the District of Columbia
ANDREW BESTOR, Plaintiff,
v.
UNITED STATES, Defendant.
Civil Action No. 02-0279 (RWR)
ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that defendant's motion to dismiss [15] be, and hereby is GRANTED. The complaint is hereby DISMISSED. All other pending motions are DENIED as moot. This is a final appealable order.

SIGNED this 4th day of June, 2002. RICHARD W. ROBERTS, United States District Judge.

Reargument Denied

United States District Court for the District of Columbia
ANDREW BESTOR, Plaintiff,
v.
UNITED STATES, Defendant.

Civil Action No. 02-0279 (RWR)
MEMORANDUM OPINION AND ORDER
Plaintiff, proceeding pro se, filed suit against the United States for its "failure to protect [p]laintiff from electromagnetic radiation, assault, and surveillance undertaken by [the] nation of Japan...." (Compl. *para* 6.) Plaintiff's suit appeared to be brought under 42 U.S.C. *SS* 1985 and 1986 (2000) and 18 U.S.C. *SS* 1584 (2000). The Court granted defendant's motion to dismiss for lack of subject matter jurisdiction because plaintiff failed to identify any claim over which this Court would have subject matter jurisdiction. Plaintiff filed a "motion for reargument," which, liberally construed, can be read as a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). Because plaintiff has failed to establish the type of extraordinary circumstances that would

(ruling p. 2)
entitle him to relief under Rule 59(e), plaintiff's motion will be denied.

"A Rule 59(e) motion 'is discretionary ' and need not be granted unless the district court finds that there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996)(quoting Nat'l Trust v. Dep't of State, 834 F. Supp. 453, 455 (D.D.C. 1993)). "Motions under Fed. R. Civ. P. 59(e) are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." Niedermeier v. Office of Max S. Baucus, 153 F. Supp. 2d 23, 28 (D.D.C. 2001). A Rule 59(e) "'is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier.'" Id. (quoting W.C. & A.N. Miller Cos. v.

United States, 173 F.R.D. 1, 3 (D.D.C. 1997)).

Plaintiff seems to offer three arguments for why the Court's final judgement in this matter should be altered or amended: 1) had the Court appointed plaintiff counsel, he would have been able to defeat defendant's motion to dismiss; 2) his suit should

(ruling page 3)
be conceptualized as stating a Bivens[1] claim; and 3) plaintiff's arguments in opposition to the defendant's motion to dismiss were meritorious, and the Court improperly dismissed his suit.

Plaintiff's argument that he is entitled to relief under Rule 59, because his request for counsel was not granted is unavailing. "The appointment of counsel in a civil case is the exception rather than the norm and is unwarranted unless the plaintiff makes a sufficient showing of likelihood of success on the merits." Rogers v. Metro. and City Police New Scotland Yard of London, Civ. A. No. 91-2124 (CRR), 1992 WL 23669, at *3 (D.D.C. Jan. 23, 1992). Here, plaintiff's complaint simply failed to allege any claims over which this Court had subject matter jurisdiction. This case was not one of those exceptional civil cases in which counsel should have been appointed.

Plaintiff's argument regarding Bivens also fails to establish that he is entitled to relief under Rule 59. First, plaintiff could have advanced the argument his suit should have been conceptualized as asserting a Bivens claim in opposing the motion to dismiss, but did not.

(Appellant's note: Actually, Bestor claims that to most *pro se* litigants unable to secure counsel 'for whatever reason other than as pauper' the judicial process represents "an emergent awareness." He previously never heard of Bivens, had no idea what Bivens might represent, and it never occurred to

him that alleging ongoing assault -which the Court presumably accepted to be true in reviewing the Complaint - the Court would not appoint counsel. A nuance to a lawyer, it is now apparent to him simply throwing more names into the caption would have made dismissing the case more difficult, but that strikes a *pro se* litigater as exactly the type of maneuvering a Court "would not look upon with favor" as undertaken by a *pro se* litigant).

(ruling page 3 continued)
Second, even construing plaintiff's complaint liberally, it cannot be read as asserting a

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1Bivens v. Six Unkown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (holding that a plaintiff can bring suit for money damages against a federal agent who has allegedly violated his rights under the Fourth Amendment of the Constitution).

(ruling page 4)
cause of action under Bivens. Third, even if plaintiff's complaint could be construed as alleging a cause of action under Bivens, the United States, which is the only defendant named in this matter, is not a proper defendant in a Bivens suit. See Robertson v. Merola, 895 F. Supp. 1, 3 (D.D.C. 1995)(noting that "Bivens suits are suits against government officials in their individual, rather than their official, capacities").

Finally, plaintiff's attempts to have this Court's final judgment altered or amended by rearguing the merits of his case are unpersuasive. The Court fully considered his arguments when granting defendant's motion to dismiss for the reasons stated in the Memorandum Opinion signed June 4, 2002.

Accordingly, it is hereby

ORDERED that plaintiff's motion to reargue [29] be, and hereby is, DENIED. All other pending motions are denied as moot. Should plaintiff wish to appeal the dismissal of his complaint, he is encouraged to consult Federal Rule of Appellate Procedure 4(a).

Signed this 5th day of August, 2002. RICHARD W. ROBERTS, United States District Court Judge.

Dismissal Affirmed (Third Amendment explicit in Brief for Appellant VII from page 30)

United States Court of Appeals for the District of Columbia Circuit
No. 02-5271, September Term, 2002 02cv00279
Andrew Bestor, Appellant v. United States of America, Appellee. Filed on Jan 28 2003.
BEFORE: Ginsburg, Chief Judge, and Sentelle and Rogers, Circuit Judges
ORDER

Upon consideration of the motion to amend the record; the motion for an expedited ruling on the motion to amend the record; the motion for discovery; the motion for injunctive relief; appellant's brief and the motion for summary reversal contained therein; the opposition to the motion for summary reversal, and motion for summary affirmance; the reply to the opposition to the motion for summary reversal, and opposition to the motion for summary affirmance, and the reply to the opposition to the motion for summary affirmance, it is

ORDERED that the motion to amend the record be dismissed as moot, because the relevant pleading is included in the district court record. It is

FURTHER ORDERED that the motion for an expedited ruling on the motion to amend the record be dismissed as moot. It is

FURTHER ORDERED that the motion for discovery be denied. It is

FURTHER ORDERED that the motion for injunctive relief be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted, because the district court correctly held that it lacked subject matter jurisdiction under 42 U.S.C. SS 1985 and 1986 and the other provisions cited by appellant. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987)(per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).
(order page 2)

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.
Per Curiam
(Initials)

Petition for en banc and panel rehearing denied
(Third Amendment)

United States Court of Appeals for the District of Columbia Circuit
No. 02-5271, September Term, 2002 02cv00279
Andrew Bestor, Appellant v. United States of America, Appellee. Filed on Mar 26 2003.

BEFORE: Ginsburg, Chief Judge, and Sentelle and Rogers, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed February 10, 2003, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT

Mark J. Langer, Clerk

BY: Michael C. McGrail Deputy Clerk

United States Court of Appeals for the District of Columbia Circuit

No. 02-5271, September Term, 2002 02cv00279

Andrew Bestor, Appellant v. United States of America, Appellee. Filed on Mar 26 2003.

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT

Mark J. Langer, Clerk

BY: Michael C. McGrail Deputy Clerk

Appendix under Rule 14 (i)(ii)
Relevant Opinion in Companion Case

Complaint Dismissed

United States District Court for the District of Columbia
ANDREW BESTOR, Plaintiff,
v.
MILTON ASHLEY, M.D., et al., Defendants.
Civil Action No. 02-1583 (RWR)
MEMORANDUM OPINION (excerpt at page 5)

Where, as here, the court lacks personal jurisdiction over the defendants, the court in it's discretion may transfer the case to another district. See Cellutech, Inc. v. Centennial Cellular Corp., 871 F. Supp. 46, 50 (D.D.C. 1994)(citing Naartex Consulting Corp. v. Watt, 722 F.2d 779, 789 (D.C. Cir. 1983), cert. denied, 467 U.S. 1210 (1984)). In this case, neither defendant has requested transfer. Additionally, plaintiff alleges that he now lives in Washington, D.C. where he has "established a defensive [perimeter] holding assailants at bay, which was not possible in Seattle, Washington." See Plaintiff's Opposition to Motions to Dismiss, p. 2. Plaintiff expresses a disinclination to return to Seattle where he anticipates further suffering. Id. Because defendants have not requested transfer and because plaintiff opposes returning to Seattle, the interests of justice do not favor transfer of this case to a federal court in the state of Washington.

[Note - As far as Bestor can determine, while accepting the allegation of torture to be true in dismissing the complaint, the Court felt it was not sufficient to warrant appointment of counsel as requested - *not as pauper* - and did not dispute that he would be subject to fairly severe electromagnetic radiation in Seattle. Apparently it is possible to get knocked out of the federal court system by assailants focusing

invidious behavior, noting Judge Roberts had just dismissed the immediately previous 42:1985 complaint].

Appendix under Rule 14 (i)(vi)
Material Petitioner Believes Essential to Understanding Petition

United States v. Wen Ho Lee (cited in Petition for Writ of Certiorari at p.23 as "home monitoring")

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
UNITED STATES OF AMERICA, Plaintiff,
vs.
WEN HO LEE, Defendant
No. CR 99-1417 JP
ORDER SETTING CONDITIONS OF RELEASE - DRAFT
(available off internet referencing "Renewed Motion" for Pretrial Release (Doc. No. 114)).
(From a list of Conditions)
1. Don and Jean Marshal, whose residence is next door to that of Dr. Lee in White Rock, New Mexico, must serve as third-party custodians of Dr. Lee during pretrial release. Either or both of them may enter Dr. Lee's residence to perform their responsibilities as custodians.
2. Dr. Lee must be in home detention at his residence, 80 Barcelona Avenue, White Rock, New Mexico at all times, with electronic monitoring by United States Pretrial Services, with the following exceptions: (essentially preparing for trial or emergency medical services).
3.Only Dr. Lee's wife, Sylvia Lee, may reside with Dr. Lee at his residence, 80 Barcelona Avenue, White Rock, New Mexico.

4. Dr. Lee's children may visit their parents at the residence, 80 Barcelona Avenue, White Rock, New Mexico, but only after visits are prearranged with Pretrial Services and federal law enforcement agencies, who may have a representative present during the visits.
5. Mrs. Sylvia Lee may leave the residence at 80 Barcelona Avenue, White Rock, New Mexico only after notifying United States Pretrial Services and designated federal law enforcement agencies advising them of the time of departure and anticipated time of return, destination, and purpose of her trip. A representative of the law enforcement agencies may search Mrs. Lee upon her departure and return.
8. Telephone calls initiated from the sole telephone that will be permitted at 80 Barcelona Avenue, White Rock, New Mexico will be restricted to United States Pretrial Services, to attorneys for Dr. Lee, or to report an emergency.
9. Dr. Lee in the presence of one of the third-party custodians must report daily by telephone to the United States Pretrial Services Office between 8:00 and 9:00 a.m. and 7:00 and 8:00 p.m.

Pervasive Contact with FBI/Department of Justice
(not including multiple telephone calls)

U.S. Department of Justice
Federal Bureau of Investigation
Washington, D.C. 20535
NOV 16 1999
Request No. 910524
Subject Self
Mr. Andrew Bestor
22933 Northeast 54th Street
Redmond, WA 98053
Dear Requester:

This is in response to your Freedom of Information-Privacy Acts (FOIPA) request noted above.

Based on the information furnished, a search of the automated indices to our central records system files at FBI Headquarters located no records responsive to your FOIPA request to indicate you and/or the subject(s) of your request have ever been of investigatory interest to the FBI. The automated indices is an index to all records created since January 1, 1958, in security, applicant, and administrative matters, as well as to all records created since January 1, 1973, in criminal matters.

If you have reason to believe records responsive to your request exist prior to the above dates, you will have to request another search. In order to respond to our many requests in a timely manner, our focus is to identify responsive records in the automated indices that are indexed as main files. A main index record carries the names of subjects of FBI investigations.

Although no main file records responsive to your FOIPA request were located in our automated indices, we are required to inform you that you are entitled to file an administrative appeal if you so desire. Appeals should be directed in writing to the Co-Director, Office of Information and Privacy, U.S. Department of justice, Suite 750, Flag Building, Washington D.C. 20530, within 60 days from receipt of this letter. The envelope and letter should be clearly marked "Information Appeal." Please cite the FOIPA request number assigned to your request so that it may easily be identified.

Sincerely yours,
John M. Kelso, Jr., Chief
Freedom of Information - Privacy Act Section
Office of Public and Congressional Affairs
U.S. Department of Justice
Federal Bureau of Investigation

Washington, D.C. 20535
October 26, 2001
Honorable George Allen
United States Senator
507 East Franklin Street
Richmond, VA 23219
Dear Senator Allen:

I am writing in response to your September 27th communication on behalf of Mr. Andrew S. Bestor. Mr. Bestor alleges, among other things, that he is being harassed by the "nation of Japan."

In order for the FBI to initiate an investigation of any complaint we receive, specific facts must be set forth to indicate that a violation of federal law within our investigative jurisdiction has occurred. As much as we would like to be of assistance to Mr. Bestor, Japanese sovereignty issues prevent us from intervening in that country's internal affairs. *I want to assure him that the FBI is not involved in activities of the kind that he mentioned (Bestor italics).* Should Mr. Bestor have any evidence that representatives of Japan's construction industry or other groups are engaging in criminal activities in the United States that he believes are in violation of any of the federal laws falling within the investigative jurisdiction of the FBI, I encourage him to provide details of such activities to our Washington Field Office, 601 Fourth Street, Northwest, Washington, D.C. 20535-0002, telephone number 202-278-2000.

I hope this information will be helpful to you in responding to Mr. Bestor, Your enclosures are being returned as requested.

Sincerely yours,
Arthur Radford Baker
Unit Chief, Office of Public and Congressional Affairs

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530
October 25, 2002
TW: bl
DJ 144-16-0
Mr. Andrew Bestor
144 11th St., SE, No. 4
Washington, D.C. 20003
Dear Mr. Bestor:

This is in reply to your correspondence to the Department. We apologize for the delay of this response.

We have carefully considered the information you furnished. The circumstances you describe do not indicate a violation of federal civil rights statute. Therefore, we have no authority to take any action on this matter.

Since you believe your rights have been violated, you may wish to retain a private attorney. However, if you lack the necessary funds, you may wish to contact the nearest legal aid or public defender's office, to determine what remedies, if any, are available to you.

Sincerely,
Theresa Weathers
Civil Rights Division

Defense Advanced Projects Research Agency as pertaining to "soldier" in the Third Amendment, cited in Petition for Writ of Certiorari at page 26

Testimony of Michael Wynne
Deputy Under Secretary of Defense (Acquisition and Technology)
Before the United States Senate Committee on Armed Services Subcommittee on Emerging Threats and

Capabilities, March 31, 2003

Page 5

"In addition, we have increased our investment in Defense Advanced Research Projects Agency (DARPA), the defense agency charged with conducting high-risk, high-payoff technologies, by almost 1/2 billion dollars a year. This additional DARPA investment is largely allocated to space technology, but in total, DARPA emphasizes research in eight strategic thrust areas. These eight are: counterterrorism; assured use of space; networked manned and unmanned systems; robust, self-forming networks; detect, identify, track and destroy elusive surface targets, characterization of underground structures; bio-revolution; and cognitive computing."

Page 12

DARPA's Role with the Services

"One concern I have heard since coming to the Department is most interesting - that concern is that DARPA is disconnected from the rest of the Department of Defense and supporting acquisition programs. Nothing could be further from the truth. In fact, this administration has put more money into DARPA because we are trying to change the technologies being developed within the Department, and DARPA is the most agile of our components with respect to changing program direction. But, DARPA has used this agility and entered into agreements with each of the Services to develop cutting edge technologies and demonstrations. For instance, DARPA and the Army are linked, through formal agreement, to enable the development of the Army of the future with networked tactical equipment and vehicles, the Future Combat System. Additionally, DARPA and the Navy are joined, through memorandum, to develop the Hy-Fly missile - a supersonic demonstrator that is on the glide path

to be an early NAI hypersonic demonstrator. Finally, there is the Unmanned Combat Aerial Vehicle (UCAV)- a system demonstration in conjunction with the Air Force. Each of these three systems - NAI, UCAV, and Hy-fly are at the nexus of critical capabilities needed by the Services - and a large programmatic change, so DARPA's agility was instrumental in meeting the need. Instead of the limited criticism that DARPA is not connected to the Services, I would turn it around and say DARPA is connected, and critical, to the transformation road maps of the Services. DARPA is in fact more critical and connected than ever."